Re Woo Yoke San @ Woo Yoke Sam; ex p OCBC Bank (M) Bhd

HIGH COURT (KUALA LUMPUR) — BANKRUPTCY NO D5–29–1190 OF 2004
RAMLY ALI J
30 MARCH 2006

Bankruptcy — Notice — Setting aside — Judgment sum disputed — Failure to comply with s 3(2)(ii) of the Bankruptcy Act 1967 — Whether a mere procedural irregularity

Bankruptcy — Notice — Setting aside — Whether notice complied with the terms of the judgment and the debt claimed in the notice was excessive — Whether amount of interest claim unspecified

On 3 July 2002, the judgment creditor ('JC') obtained a judgment against the judgment debtor ('JD') as guarantor ('the said judgment'). On 23 April 2004, the JC issued the bankruptcy notice against the JD. On 12 July 2004, the bankruptcy notice was served personally on the JD. Seven days after that an act of bankruptcy was committed by the JD for failure to comply with the demand made in the bankruptcy notice. On 11 August 2004, the JD filed an application to set aside the bankruptcy notice. This was the JC's appeal against the decision of the learned senior assistant registrar in allowing the JD's application to set aside the bankruptcy notice. The two grounds on which the JD seeks to set aside the bankruptcy notice were as follows: (1) the bankruptcy notice did not comply with the terms of the said judgment and the debt claimed in the bankruptcy notice was excessive; and (2) the JC has failed to first realise the property charged as security to the JC. The JC raised a preliminary issue that the JD has not complied with s 3(2)(ii) of the Bankruptcy Act 1967 ('the Act') which requires the JD to give notice that he disputes the validity of the bankruptcy notice within the time stipulated therein for payment, ie within seven days after date of service of the bankruptcy notice on the JD.

Held, allowing the appeal with costs:

(1) The JD's dispute on the sum in the bankruptcy notice was filed only 30 days after the bankruptcy notice was served on the JD and 22 days after the commission of the act of bankruptcy by the JD. The JD had failed to comply with the requirement under s 3(2)(ii) of the Act. Strict compliance with s 3(2)(ii) of the Act is mandatory. Failure of the JD to comply with the said requirements cannot be regarded as merely a procedural irregularity (see para 10).

(2) As long as the interest demanded from the JD in the bankruptcy notice is quantified, the bankruptcy notice is valid notwithstanding that the base

lending rate for the interest claimed is not specified. The bankruptcy notice had complied with all these requirements, whereby the accrued interest was quantified and specified in the particulars of claim of the bankruptcy notice. There was no question of ambiguity. There was also no question that the JD could be misled, embarrassed or perplexed in the bankruptcy notice (see paras 17, 19).

(3) The terms of the said judgment allowed the JC to claim for compound interest, as 'monthly rest' is a banking term for compound interest: *Malayan Banking Bhd v Foo See Moi* [1981] 2 MLJ 17 followed. The interest rate 'on daily basis with monthly rest' simply means that the amount of interest payable is calculated based on the specified rate (ie 3.5% pa on the applicable BLR at any point of time) on the amount outstanding and such calculation is made on daily basis (ie every day) up to the period of month. At the completion of one month period, the amount of interest calculated (for the past one month) will be capitalised and ultimately will attract interest at the same rate for the next months. The process goes on every subsequent month. In effect, it is just like compound interest or interest upon interest (see paras 30, 32).

[Bahasa Malaysia summary

Pada 3 Julai 2002, pemiutang penghakiman ('JC') telah mendapat penghakiman terhadap penghutang penghakiman ('JD') sebagai penggerenti ('penghakiman tersebutt'). Pada 23 April 2004, JC telah mengeluarkan notis kebankrapan terhadap JD. Pada 12 Julai 2004, notis kebankrapan itu disampaikan secara kediri ke atas JD. Tujuh hari selepas itu satu tindakan kebankrapan dilakukan oleh JD kerana gagal untuk mematuhi tuntutan yang dibuat dalam notis kebankrapan itu. Pada 11 Ogos 2004, JD telah memfailkan satu permohonan untuk mengenepikan notis kebankrapan itu. Ini adalah rayuan JC terhadap keputusan penolong kanan pendaftar membenarkan permohonan JD untuk mengenepikan notis kebankrapan itu. Dua alasan yang JD ingin ketepikan notis kebankrapan itu adalah seperti berikut: (1) notis kebankrapan itu tidak mematuhi terma-terma penghakiman tersebut dan hutang yang dituntut dalam notis kebankrapan adalah melampau; dan (2) JC gagal untuk pertamanya menyedari hartanah yang digadaikan sebagai cagaran kepada JC. JC telah menimbulkan satu isu awalan bahawa JD tidak mematuhi s 3(2)(ii) Akta Kebankrapan 1967 ('Akta tersebut') yang menghendaki JD memberikan notis bahawa beliau mempertikaikan kesahan notis kebankrapan dalam tempoh masa yang ditetapkan untuk bayaran, iaitu dalam tempoh tujuh hari selepas tarikh penyampaian notis kebankrapan ke atas JD.

Diputuskan, membenarkan rayuan tersebut dengan kos:

(1) Pertikaian JD berhubung jumlah dalam notis kebankrapan telah difailkan hanya 30 hari selepas notis kebankrapan disampaikan ke atas JD dan 22 hari selepas JD melakukan tindakan kebankrapan itu JD telah gagal untuk mematuhi keperluan di bawah s 3(2)(ii) Akta. Pematuhan ketat s 3(2)(ii) Akta adalah mandatori. Kegagalan JD mematuhi keperluan tersebut tidak boleh dianggap hanya sebagai satu luar aturan prosedur (lihat perenggan 10).

(2) Selagi faedah dituntut daripada JD dalam notis kebankrapan boleh dikira, notis kebankrapan adalah sah meskipun kadar pinjaman asas untuk faedah tidak ditetapkan. Notis kebankrapan itu telah mematuhi semua keperluan tersebut, di mana faedah yang terakru boleh dikira dan ditetapkan dalam butiran tuntutan notis kebankrapan itu. Tiada persoalan tentang ketaksaan. Tiada juga persoalan bahawa JD boleh terpedaya, malu atau bingung dengan notis kebankrapan itu (lihat perenggan 17, 19).

(3) Terma-terma dalam penghakiman tersebut membenarkan JC menuntut untuk kompaun faedah, kerana 'monthly rest' adalah terma perbankan untuk kompaun faedah: *Malayan Banking Bhd v Foo See Moi* [1981] 2 MLJ 17 diikut. Kadar faedah 'on daily basis with monthly rest' bermaksud bahawa jumlah faedah yang perlu dibayar dikira berdasarkan kadar yang ditetapkan (iaitu 3.5% setahun ke atas BLR yang digunakan pada bila-bila masa tertentu) ke atas baki jumlah dan pengiraan tersebut dibuat harian (iaitu setiap hari) sehingga tempoh bulan itu. Di akhir tempoh satu bulan, jumlah faedah yang dikira (untuk sebulan lepas) akan dijadikan modal dan akhirnya akan menjadi faedah pada kadar yang sama untuk bulan-bulan berikutnya. Proses ini berterusan setiap bulan berikutnya. Oleh itu, ia adalah seperti kompaun faedah atau faedah atas faedah (lihat perenggan 30, 32).]

Notes

For cases on setting aside notice, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2582–2621.

Cases referred to

Annie Lim, Re [1987] 2 MLJ 276 (refd)
Dato Loh Fook Yen v Malayan United Finance Berhad [1989] 1 CLJ 187 (refd)
Development & Commercial Bank Bhd v Datuk Ong Kian Seng [1995] 2 MLJ 724 (refd)
J Raju a/l M Kerpaya v Commerce International Merchant Bankers Bhd [2000] 3 MLJ 177 (refd)
Lim Kim Guan & Anor v Four Seas Communications Bank Ltd [1990] 3 CLJ (Rep) 757 (refd)
Low Mun v Chung Khiaw Bank Ltd [1988] 1 MLJ 263 (refd)
MSA Zachariah, Re; ex parte Boon Siew Finance Bhd [1993] 3 CLJ 279 (refd)
Malayan Banking Bhd. v Foo See Moi [1981] 2 MLJ 17 (folld)
Sovereign General Insurance Sdn. Bhd. v Koh Tan Bee [1988] 1 MLJ 304 (refd)

Legislation referred to

Bankruptcy Act 1967 ss 3(1)(c), 3(1)(i), 3(2)(ii), 5
Civil Law Act 1956 s 11
Court of Judicature Act 1964 s 25(2)
Rules of the High Court 1980 O 42 r 12

Khalid A Jalil (Dennis Nik & Wong) for the judgment debtor/respondent.
WT Haw (Shook Lin & Bok) for the judgment creditor/appellant.

Ramly Ali J:

[1] This is the judgment creditor's (JC) appeal against the decision of the learned senior assistant registrar made on 6 September 2005 in allowing the judgment debtor's (JD) summon in chambers to set aside the bankruptcy notice dated 11 August 2004 with costs.

CHRONOLOGY OF PROCEEDINGS

[2] On 3 July 2002, the JC obtained a judgment against the JD as guarantorvide Kuala Lumpur High Court Suit No D7–22–1443 of 2001. On 23 April 2004 the JC issued the bankruptcy notice against the JD.

On 12 July 2004, the bankruptcy notice was served personally on the JD. Seven days after that (ie, on 20 July 2004) an act of bankruptcy was committed by the JD for failure to comply with the demand made in the bankruptcy notice. On 11 August 2004, the JD filed an application (vide encl 5) to set aside the bankruptcy notice.

JD'S GROUNDS TO SET ASIDE THE BANKRUPTCY NOTICE

[3] The two grounds on which the JD seeks to set aside the bankruptcy notice are as follows:

(a) the bankruptcy notice does not comply with the terms of the said judgment and the debt claimed in the bankruptcy notice is excessive; and

(b) the JC has failed to first realise the property charged as security to the JC.

JC'S PRELIMINARY ISSUE

[4] The JC on the other hand raised a preliminary issue that the JD has not complied with s 3(2)(ii) of the Bankruptcy Act 1967 which requires the JD to give notice that he disputes the validity of the bankruptcy notice within the time stipulated therein for payment ie, within seven days after date of service of the bankruptcy notice on the JD.

Judgment dated 3 July 2002 against the JD

[5] On 3 July 2002, the JC had obtained a judgment against a company known as Gluxe Corporation Sdn Bhd, the principal borrower under a loan facility granted by the JC and against the JD as the guarantor in the Kuala Lumpur High Court Suit No D7–22–1443 of 2001. In essence, the terms of the said judgment say inter aliaas follows:

(1) a sum of RM277,494.31 under Term Loan (A/C: 702–404906–6) as at 30 June 2001;

(2) interest thereon at the rate of 3.5% pa above plaintiff's base lending rate on daily basis with monthly rests calculated from 1 July 2001 until full realisation;

(3) a sum of RM267,531.90 under Term Loan (A/C No: 702–409824–5) as at 30 June 2001;

(4) interest thereon at the rate of 3.5% pa above plaintiff's base lending rate on daily basis with monthly rests calculated from 1 July 2001 until full realisation;

(5) a sum of RM1,047,316.88 under Revolving Loan (A/C No: 702–404912–0) as at 30 June 2001;

(6) interest thereon at the rate of 3.5% pa above plaintiff's base lending rate on daily basis with monthly rests calculated from 1 July 2001 until full realisation; and

(7) costs on solicitors client basis.

BANKRUPTCY NOTICE DATED 23 APRIL 2004

[6] Based on the said judgment, the JC issued a bankruptcy notice dated 23 April 2004 against the JD which, inter alia, contained the following demand and particulars:

BANKRUPTTCY NOTICE

WOO YOKE SAN @ WOO YOKE SAM
No 64, Jalan 28
Taman Overseas Union
Jalan Kelang Lama
58200 Kuala Lumpur

TAKE NOTICE that within seven (7) days after service of this Notice on you, excluding the day of such service you must pay to OCBC Bank (Malaysia) Berhad of Wisma Lee Rubber, Jalan Melaka, 50100 Kuala Lumpur, the sum of Ringgit Malaysia Two Million and Ninety Six Thousand Three Hundred nd Ninety Four and Sen Seventy Two Only (RM2,096,394.72) claimed by them as being the amount due on the final Judgment obtained by them against you in the High Court at Kuala Lumpur vide Suit No: D7–22–1443–2001 on the 3rd day of July, 2002 whereupon execution had not been stayed, or you must secure or compound for the said sum to their satisfaction or the satisfaction of the Court; or you satisy the Court that you have a counter-claim, set-off, or cross demand against them which equals or exceeds the sum claimed by them, and which you could not set up in the action in which the Judgment was obtained.

Dated this 23rd day of April, 2004

[7] The bankruptcy notice was duly issued pursuant to s 3(1)(c) of the Bankruptcy Act 1967 as the JC has obtained a final judgment against the JD, execution thereon not having been stayed. Section 3(1)(i) of the Bankruptcy Act 1967 provides:

(1) A debtor commits an Act of bankruptcy in each of the following cases:

(i) if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him in Malaysia, or by leave of the Court elsewhere, a bankruptcy notice under this Act

requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order to be paid in accordance with the terms of the judgment or order (with interest quantified up to the date of the bankruptcy notice) or to secure or compound for it to the satisfaction of the creditor or the Court; and he does not within seven days after service of the notice in case the service is effected in Malaysia, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the Court that he has a counter-claim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which he order was obtained:

Provided that for the purposes of this paragraph and of section 5 any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order:

JC's PRELIMINARY ISSUE: s 3(2)(II)

[8] Section 3(2)(ii) of the Bankruptcy Act 1967 provides as follows:

(2) A bankruptcy notice under this Act shall be in the prescribed form and shall state the consequences of non-compliance therewith and shall be served in the prescribed manner:

Provided that a bankruptcy notice:

(i) …

(ii) shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mistake; but if the debtor does not give such notice he shall be deemed to have complied with the bankruptcy notice, if within the time allowed he takes such steps as would have constituted compliance with the notice had the actual amount due been correctly specified therein.

[9] The bankruptcy notice in the present case was duly served personally on the JD on 12 July 2004. The time stipulated in the bankruptcy notice for payment is seven days after date of service of the bankruptcy notice on the JD. The JD therefore, by virtue of s 3(2)(ii) of the Act, must give notice to the JC by 19 July 2004 (within seven days after service of the bankruptcy notice) that he disputes the validity of the bankruptcy notice with respect to the sum specified therein. Failing to do so within that period, two things happen under s 3(1)(i) and s 3(2)(ii), that is:

(i) the JD would have committed an Act of bankruptcy on 27 July 2004 (after expiry of the seventh day), which constitutes the cause of action for filing a creditor's petition under s 5 of the Bankruptcy Act 1967; and

(ii) secondly, s 3(2)(ii) of the Bankruptcy Act 1967 operates to render the bankruptcy notice valid notwithstanding any dispute of the sum stated therein subsequently.

[10] The JD first disputed the sum in the bankruptcy notice under this application (encl 5) which was filed only on 11 August 2004, ie 30 days after the bankruptcy notice was served on the JD and 22 days after the commission of the Act of bankruptcy by the JD. The JD has clearly failed to comply with the requirement under s 3(2)(ii). No notice was ever given by the JD before he filed his applicationvide encl 5. Therefore, the entire grounds is rendered a non-issue and non-starter. Strict compliance with s 3(2)(ii) of the Bankruptcy Act 1967 is mandatory. Failure of the JD to comply with the said requirements cannot be regarded as merely a procedural irregularity. There are a number of authorities on this point. In *Development & Commercial Bank Bhd v Datuk Ong Kian Seng* [1995] 2 MLJ 724; the Federal Court held, inter alia, that (at p 733):

> the respondent cannot be allowed to dispute the validity of the bankruptcy notice on the ground on which he now relies because the notice of dispute by way of his affidavit affirmed on 18 February 1992 has not complied with proviso (ii) to section 3(2) of the Act, it having been served on the appellant about seven months after the service of the bankruptcy notice on him (the Respondent). The bankruptcy notice cannot therefore be challenged as to the interest specified therein.

Similarly in *J Raju a/l M Kerpaya v Commerce International Merchant Bankers Bhd* [2000] 3 MLJ 177, the Court of Appeal held (at p 188):

> A debtor who seeks to challenge a bankruptcy notice on the ground that the amount specified therein exceeds the amount actually due, must act in accordance with proviso (ii) to section 3(2) of the Act. Hence, he must, within the time prescribed in the bankruptcy notice give notice in writing to the creditor that he disputes the validity of the notice on the ground that it mistakenly claims an amount larger than that lawfully due.

[11] It was also held in the case of *Re MSA Zachariah, ex parte Boon Siew Finance Bhd* [1993] 3 CLJ 279, in which T Selventhiranathan JC (as he then was) referred to the case of *Re Loh Kok Hua; ex parte Ban Hin Lee Bank Bhd* [1991] 3 CLJ 1817 and held that the JD cannot raise the issue that the Bankruptcy Notice sum is incorrect unless he has given notice to the JC under s 3(2)(ii) of the Bankruptcy Act 1967 within the stipulated time period.

[12] In *Dato Loh Fook Yen v Malayan United Finance Berhad* [1989] 1 CLJ 187, it was held that the notice of dispute had not complied with s 3(2)(ii) of the Bankruptcy Act 1967 having been delivered eight days after the service of the bankruptcy notice therein, only one day out of the time period stipulated but nevertheless outside the time allowed for payment and therefore the bankruptcy notice is valid.

[13] In the premise, the JD's application vide encl 5 to set aside the bankruptcy notice dated 23 April 2004 can be dismissed with cost, just on this ground alone, ie failure to comply with requirements under s 3(2)(ii) of the Bankruptcy Act 1967.

[14] For the sake of completeness, the court will now deal with the two grounds raised by the JD in supporting his application under encl 5.

FIRST GROUND: THE BANKRUPTCY NOTICE DOES NOT COMPLY WITH THE TERMS OF THE SAID JUDGMENT AND THE DEBT CLAIMED IN THE BANKRUPTCY NOTICE IS EXCESSIVE

[15] The JD claims that from the said judgment, the court only allowed the JC's claim for simple interest of 3.5% pa above the JC's Base Lending Rate (BLR) on the judgment sum of RM1,592,343.09 from 1 July 2001 until full settlement of the judgment sum. The JD further contends, a close perusal of the bankruptcy notice reveals that the JC had not provided or disclosed the BLR and the manner of computing or calculating the interest rate in the said notice together with a claim for compounded interest or interest upon interest which flies in the face of the judgment. Hence, the JD argues that, the said claim is not only excessive but the JC is demanding for something to which it was not entitled under the said judgment.

[16] The terms of the said judgment provides for a total sum of RM1,592,343.09 (ie RM277,494.31 + RM267,531.90 + RM1,047,316.88) as at 30 June 2001 with interest thereon at the rate of 3.5% pa above the JC's Base Lending Rate on daily basis with monthly rests from 1 July 2001 until the date of full payment.

[17] The court observed that the bankruptcy notice was issued in strict compliance with the terms of the judgment, namely:

(i) The judgment sum in the total of RM 1,592,343.09 (ie RM277,494.31 + RM267,531.90 + RM1,047,316.88) as at 30 June 2001 is stated therein;

(ii) The accrued interest at the rate of 3.5% pa above the JC's Base Lending Rate on daily basis with monthly rests from 1 July 2001 until the date of issuance of the bankruptcy notice (ie 23 April 2004) is also quantified and specified therein, ie in the total sum of RM504,051.63 (ie. RM87,840.01 + RM84,686.45 + RM331.525.17);

(iii) The total amount due under the bankruptcy notice as at 23 April 2004 in the sum RM2,096,394.72 (judgment sum plus accrued interests), and how this amount is derived from, is clearly shown therein.

[18] The JD thus has no reason to say that he could not ascertain the amount due to the JC under the bankruptcy notice at 23 April 2004.

[19] The JD argues that the bankruptcy notice does not set out the formula for or the manner of computing or calculating the interest or BLR charged. The court of is of the view that the issuance of a bankruptcy notice is a condition precedent to the cause of action for filing creditor' petition. In other words, the JC is entitled to institute creditor's petition against the JD if the JD fails to comply with the demand for payment made in the bankruptcy notice within the stipulated period therein. Consequently, when the JC has a judgment against the JD, the bankruptcy notice must require payment of quantified sum or sums alleged to be due according to the

terms of the judgment as at the date of issue of bankruptcy notice. It is the duty of the JC to state the correct amount due. The amount claimed in the notice must be expressly quantified or specified. The JD is entitled to know from the bankruptcy notice exactly what is being claimed to be due on the whole judgment debt and payable by him within the seven days period. This is an important requirement in order for the JD to avoid an Act of bankruptcy. The test in each case is whether the JD could be so misled, embarrassed or perplexed in the bankruptcy notice (per LP then J in *Lim Kim Guan & Anor v Four Seas Communications Bank Ltd* [1990] 3 CLJ (Rep) 757) In a bankruptcy proceeding, proof of an Act of bankruptcy must be clear and convincing since no person should be made a bankrupt on an ambiguity. (see: *Low Mun v Chung Khiaw Bank Ltd* [1988] 1 MLJ 263).

[20] In the case of Lim Kim Guan the court held that:

> In my opinion, if the interest is not quantified in a specific sum in the bankruptcy notice, the special interest rate of interest must be specified so that on the face the amount of interest is capable of being ascertained.

[21] It is clear from the above decision that only in situation whereby the interest claimed is not quantified or specified that the interest rate has to be stated.

[22] The Federal Court in *Low Mun* also said:

> a bankruptcy notice under the Act must require payment of quantified sum or sums alleged to be due according to the terms of the judgment as at the date of issue of the bankruptcy notice.
>
> The amount must be quantified because the debtor is entitled to know from the bankruptcy notice exactly what is being claimed to be due on the whole judgment debt and payable by him within the seven day's period.

[23] What the Federal Court actually meant was that the judgment sum, the interest, costs, etc must be quantified or specified so that the judgment debtor can ascertain the amount due and payable by him.

[24] Applying the above decisions, it can be concluded that as long as the interest demanded from the judgment debtor in the bankruptcy notice is quantified, the bankruptcy notice is valid notwithstanding that the base lending rate for the interest claimed is not specified.

[25] The bankruptcy notice in our present case has certainly complied with all the above requirements, whereby the accrued interest from 1 July 2001 to 23 April 2004 is clearly quantified and specified (ie, in the total sum of RM504,051.63) in the particulars of claim of the bankruptcy notice. The JD can ascertain how mush is the accrued interest due and payable to the JC as at 23 April 2004. There is no question of ambiguity. Here is also no question that the JD could be misled, embarrassed or perplexed in the bankruptcy notice.

A **[26]** In the cases of *Lim Kim Guan* and *Low Mun*, the bankruptcy notice therein did not quantify and specifying the amount to be paid by the JD as at the date of filing of the bankruptcy notices. In *Lim Kim Guan* the material part of the bankruptcy notice reads as follows — 'to pay the sum RM201,479.41 plus interest thereon from 1 June 1988 to date of judgment at the rate of 3.75% pa above the B plaintiff's prime lending rate on the basis of a 365 days year with monthly rests …' The court applied the test of whether the JD could have been misled, embarrassed or perplexed by such notice. The court held that the notice was invalid because it was not explicit and clear on the face of the bankruptcy notice how much the JD had to pay in terms of interest. In that case, the amount of interest to be paid is not C quantified and not specified at all. The bankruptcy notice has also not provide the available 'prime lending rate' applicable at the material time. Obviously, the JD in that case would not be in the position to know exactly how much he has to pay in the bankruptcy notice.

D **[27]** Again, in *Low Mun*, the material part of the bankruptcy notice reads as follows — 'to pay the sum of RM2,325,000 together with interest thereon at the rate of 3% above the JC's base rate of interest per annum with monthly rests in respect of the sum of RM2,100,000 and yearly rests in respect of the sum of RM200,000 from 27 February 1983 until payment thereof and costs to be taxed …' The amount of E interest and costs to be taxed is not quantified and specified in the notice. The JD was not in a position to know exactly how much he has to pay under the notice if he choose to avoid an Act of bankruptcy. Similarly, the Federal Court held that the bankruptcy notice was invalid and failure on the part of the JD to comply with such a notice is not an act of bankruptcy. The facts of the above two cases (*Lim Kim Guan* F and *Low Mun*) clearly can be distinguished from the facts of the present case. In our present case, the judgment sums as well as the amounts of all the applicable interest was clearly and definitely quantified as at the date of issue of the bankruptcy notice. The JD cannot complaint that he does not know the exact amount to be paid under the notice. Such being the case, there is no requirement for the JC's BLR and the manner of computing the interest to be disclosed in the bankruptcy notice.

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[28] The JD further complains that the interest computation is incorrect in the sense that in the said judgment, the court only allowed the JC's claim for simple interest of 3.5% pa above the JC's BLR on the judgment sum of RM1,592,343.09 from 1 July 2001 until full settlement of the judgment sum.

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[29] Looking at the said judgment, the actual wordings used are: 'interest thereon at the rate of 3.5% pa above the plaintiff's base lending rate on daily basis with monthly rests calculated from 1 July 2001 until full satisfaction.'

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[30] The terms of the said judgment clearly allow the JC to claim for compound interest, as 'monthly rest' is a banking term for compound interest. His Lordship Justice Chang Min Tat FJ in the Federal Court case of *Malayan Banking Bhd v Foo See Moi* [1981] 2 MLJ 17 explained the term 'monthly rest' as follows:

> … the practice of bankers in debiting interest to an overdrawn current account periodically and thereby increasing the capital sum, which is the effect of the provision for periodical 'rests'.

[31] *Paget on Banking* (8th Ed) at p 133 justifies it thus:

> There is no common law right to charge even simple interest on an overdraft but the claim could be supported on the ground of universal custom of bankers or on the basis of implied agreement. Where the customer has acquiesced in the system under which the interest is charged, that also would justify the claim. Such acquiescence will justify the charging compound interest or interest with periodical rests, so long as the relation of banker and customer exists, and the relationship is not changed into that of mortgage and mortgagor. The taking of a mortgage or a charge by way of legal mortgage to secure the fluctuating balance of an account is not, however, inconsistent with the relation of banker and customer so as to preclude compound interest.

[32] The interest rate 'on daily basis with monthly rest' simply means that the amount of interest payable is calculated based on the specified rate (ie 3.5% pa on the applicable BLR at any point of time) on the amount outstanding and such calculation is made on daily basis (ie every day) up to the period of month. At the completion of one month period, the amount of interest calculated (for the past one month) will be capitalised and ultimately will attract interest at the same rate for the next months. The process goes on every subsequent months. In effect, it is just like compound interest or interest upon interest. The JD also argues that s 11 of the Civil Law Act 1956 prohibits the granting of compound interest. The JD cited the provisions of s 11 to support his claim. With respect, the court cannot agree with the JD's submission on this point.

[33] Section 11 of the Civil Law Act 1956 deals with the power of courts to awards interest on debts and damages. The provisions is reproduced below:

> In any proceedings tried in any Court for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:
>
> Provided that nothing in this section:
>
> (a) shall authorise the giving of interest upon interest;
>
> (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or
>
> (c) shall affect the damages recoverable for the dishonour of a bill of exchange.

[34] Section 11 does not declare that interest upon interest or compound interest is illegal or invalid. Section 11 in effect is just enabling provisions giving powers to the court to award interest for the whole or any part of the period 'between the date when the cause of action arose and the date of judgment'. Proviso (a) to the said s 11 specifically states that the provisions does not authorise the giving of interest upon

interest. What it means is that s 11 is not an authority for awarding interest upon interest. If the award of interest upon interest is to be made then the court has to find other form of authority to do so but not on the authority of s 11. Other form of authority to award interest upon interest can be found in s 25(2) of the Court of Judicature Act 1964 read together with para 7 of the Schedule thereto and O 42 r 12 of the Rules of the High Court 1980.

[35] Para 7 of the Schedule to the Court of Judicature Act 1964 provides for the power of the courts to direct interest to be paid on debts, including judgment debts, or on sums found due on taking accounts between parties or on sums found due and unpaid by receivers or other persons liable to account to the Court. Order 42 r 12 of the Rules of the High Court 1980 provides 'every judgment debt shall carry interest at the rate of 8% pa or at such other rate not exceeding the rate aforesaid as the court directs (unless the rate has been otherwise agreed upon between the parties) such interest to be calculated from the date of judgment until the judgment is satisfied.' The underlined part of O 42 r 12 above clearly empowers the court to award whatever rate of interest (other than 8% pa) if such rate has been agreed by the parties.

[36] The court is satisfied that the terms of the said judgment are clear in allowing the JC to claim for compound interest. In the present case, the agreements between the JC and the Borrower in respect of the credit facilities granted by the JC to the Borrower provide for the interest to be charged on monthly rests basis. The relevant provisions are cl 5(5) of the loan agreement for the Revolving Credit Facility of RM1m; Clause 6(6) of the loan agreement for the term loan agreement for the Term Loan of RM1.5m as exhibited as exhs 'OCBC3' of encl 9. The JD as guarantor to the said facilities has agreed to be bound by the terms of the said provisions. In other words, all the parties have agreed to the applicable rate of interest on monthly rests basis which has the effect of compound interest or interest upon interest. Therefore, the JC's right to claim interest on compounded basis is a non-issue.

[37] In any event, since under the said judgment the court has clearly allowed the JC's claim for interest on daily basis with monthly rests, ie compound interest, parties cannot at this stage, go behind the said judgment to challenge the same. It is trite law that the court cannot go behind the judgment in the exercise of its jurisdiction in bankruptcy proceedings and enquire into the validity of the debt (see *Sovereign General Insurance Sdn. Bhd. v Koh Tan Bee* [1988] 1 MLJ 304). Therefore, until the said judgment is set aside, the bankruptcy notice confirms to the terms of the said judgment and remains valid. (see *Re Annie Lim* [1987] 2 MLJ 276)

CONCLUSION

[38] Once again the court reiterate that:

(i) The JD in trying to dispute the amount claimed by the JC in the bankruptcy notice has failed to comply with s 3(2)(ii) of the Bankruptcy Act 1967 — for failure to give notice of the dispute within seven days after service of the bankruptcy notice. On this ground alone, the appeal by the JD must fail;

(ii) There is no requirement under the law that the base lending rate must be specified in the bankruptcy notice, as long as the amount of interest claimed has been specified and can be ascertained;

(iii) The terms of the said judgment clearly allow the JC to claim for compound interest. Monthly rest is a banking term for compounding interest. The JD cannot go behind the judgment to challenge the JC's right to claim compound interest.

[39] In the premises, the court concludes that the JC's appeal is allowed with costs.

Appeal allowed with costs.

Reported by Peter Ling